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HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE
COUNCIL FOR READY INFRASTRUCTURE
ANALYSIS

BILL #: CS/HB 203

RELATING TO: Improper Activity over the Internet

SPONSOR(S): House Committee on Information Technology, Representative(s) Ryan, Hogan, Paul, Melvin, Stansel, Kendrick, Spratt, Brutus, Henriquez, Smith, Justice, Fiorentino, Gelber and Mahon

TIED BILL(S): SB 144

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) INFORMATION TECHNOLOGY YEAS 11 NAYS 0
(2) CHILD & FAMILY SECURITY YEAS 10 NAYS 0
(3) JUVENILE JUSTICE YEAS 6 NAYS 0
(4) COUNCIL FOR READY INFRASTRUCTURE YEAS 20 NAYS 0
(5)

I. SUMMARY:

This bill amends s. 827.071(1)(g), F.S., to conform the definition of "sexual conduct" provided in that section with the definition of "sexual conduct" provided in s. 847.001(11), F.S. Section 827.071, F.S., provides criminal penalties related to sexual performance by a child. Chapter 847, F.S., relates to obscene literature and profanity. The bill provides new definitions for "child pornography" and "transmit" as used in chapter 847. The bill also revises other definitions found in s. 847.001, F.S. The bill amends s. 847.0135(2), F.S., to give effect to the felony penalty for computer pornography.

The bill creates s. 847.0137, F.S., which provides a third degree felony offense for any person who knowingly transmits or reasonably should know that he or she is transmitting child pornography to another if either the sender or receiver of the prohibited transmission is in Florida. The section also provides a third degree felony offense for any person who knowingly transmits or reasonably should know that he or she is transmitting any image, information or data harmful to minors to a minor in Florida. The bill creates s. 847.0139, F.S., which provides immunity from civil liability for any person who makes a report to a law enforcement officer of what he or she reasonably believes to be evidence of child pornography, transmission of child pornography, or transmission of any image, information or data harmful to minors to a minor in Florida.

Opponents of the bill may raise constitutional challenges to this legislation. Other state and federal laws recently enacted in order to regulate Internet communications have been held unconstitutional under both the First Amendment and the Commerce Clause of the United States Constitution.

The bill is not anticipated to have a significant fiscal impact. The Criminal Justice Impact Conference will consider the bill at its next meeting.

The bill takes effect July 1, 2001.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No [X]	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No [X]	N/A []
4.	Personal Responsibility	Yes [X]	No []	N/A []
5.	Family Empowerment	Yes [X]	No []	N/A []

For any principle that received a "no" above, please explain:

The bill could increase the burdens on the criminal justice system by encouraging reporting and providing additional offenses, which may result in increased criminal prosecutions. The bill would restrain individual freedom to disseminate child pornography and "images harmful to minors."

B. PRESENT SITUATION:

The Computer Pornography and Child Exploitation Act of 1986

Chapter 847, F.S., regulates the dissemination of obscene literature and profanity. Section 847.0135, F.S., is cited as the "Computer Pornography and Child Exploitation Prevention Act of 1986" (Act). The Act is intended to prevent computers and computer on-line services from being used as tools for the exploitation and abuse of minors.

Section 847.0135(2), F.S., relates to computer pornography and addresses offenders who use a computer to facilitate, encourage, offer, or solicit sexual conduct of or with a minor or the visual depiction of such conduct. Section 847.0135(2) intends to prohibit the compilation, publication or transmission by means of a computer of any identifying information about a minor, such as the minor's name, residence, or phone number, for the purpose of soliciting sexual conduct of or with the minor or for the purposes of soliciting a visual depiction of sexual conduct with the minor. The subsection provides in the last sentence that any person who violates its provisions commits a third degree felony. However, due to an apparent drafting error, there is presently no language in the subsection that directly ties the prohibited conduct specified in s. 847.0135(2) to the language that intends to make such conduct a third-degree felony. The absence of such language could arguably impede prosecutions of offenders who have committed acts specified in the section.

Recommendations of the Information Service Technology Development Task Force

In 1999, the Legislature created the Information Service Technology Development Task Force (Task Force) within the Department of Management Services. *See* Ch. 99-354, L.O.F. The Task Force, whose two-year term expires on June 11, 2001, is comprised of 34 bipartisan members from the public and private sector. The Task Force divided its stated directives among eight subcommittees. In the Task Force's "2001 Annual Report to the Legislature (February 14, 2001)", the eLaws - Civil and Criminal Subcommittee of the Task Force noted that, while Internet development is a rapidly expanding enterprise and the issue of transmission of adult and child

pornography is difficult to resolve, legislation should be enacted to address the problem.[1] [2] This report is available at http://www.itflorida.com/pdfs/2001_legislative_report.pdf.

The Task force stated that legislation should be enacted to address the following criminal activities over which Florida has jurisdiction:

1. Where a person inside or outside of the State of Florida knowingly transmits or reasonably should know that he or she is transmitting any type of pornography to a minor in Florida;

2. Where a person inside the State of Florida transmits child pornography to anyone inside or outside the State of Florida;

3. Where a person outside the State of Florida knowingly transmits or reasonably should know that he or she is transmitting child pornography to anyone in the State of Florida.

The Task Force also stated, "[l]egislation should be enacted which would grant civil immunity to any computer repair person, photo developer, or any other person who reports what they reasonably believe to be child pornography to the appropriate law enforcement agents . . . *However, no mandatory 'snitch' provision should be included in a law enacted.*" (emphasis in original).

State Criminal Jurisdiction

Jurisdiction and venue in criminal cases is addressed in Ch. 910, F.S. Whether Florida can assert criminal jurisdiction over a person in another state is governed by s. 910.005, F.S.[3] Section 910.005(1), F.S., provides that a person is subject to prosecution in Florida for an offense that she or he commits, while either within or outside the state, if:

(a) The offense is committed wholly or partly within the state;
(b) The conduct outside the state constitutes an attempt to commit an offense within the state;
(c) The conduct outside the state constitutes a conspiracy to commit an offense within the state, and an act in furtherance of the conspiracy occurs in the state;

(d) The conduct within the state constitutes an attempt or conspiracy to commit in another jurisdiction an offense under the laws of both this state and the other jurisdiction; or
(e) The conduct constitutes a knowing violation of s. 286.011, F.S. (relating to public meetings and records).

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[1] A report released by the National Center for Missing and Exploited Children supports the Task Force's findings regarding the pervasiveness of child pornography and the use of the Internet to victimize children by exposing them to pornographic materials. *See* National Center for Missing and Exploited Children, *"Online Victimization: A Report on the Nation's Youth"*(June 2000) [*available at* www.ncmec.org].

[2] Findings from the Youth Internet Safety Survey conducted by the Crimes against Children Research Center at the University of New Hampshire revealed information about incidents of possible online victimization through telephone interviews with a national sample of 1,501 youth ages 10 through 17 who used the Internet regularly (at least once a month for the past 6 months). The survey addressed three main issues: sexual solicitations and approaches, unwanted exposure to sexual material, and harassment. Among other highlights, the survey found that almost one in five of the young Internet users surveyed received an unwanted sexual solicitation in the past year and that approximately one in four had experienced unwanted exposures to sexual material. *Highlights of the Youth Internet Safety Survey*. Fact Sheet. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (March 2001)

[3] Section 910.005 essentially codified the holding in *Lane v. State*, 388 So. 2d 1022 (Fla. 1980), that a person who commits a crime partly in one state and partly in another state may be tried in either state under the sixth amendment of the United States Constitution. The *Lane* court acknowledged, however, that this broader jurisdiction still required the prosecution to establish beyond a reasonable doubt that essential elements of the offense were committed within the jurisdiction of the State of Florida.

A person may also be subject to Florida criminal jurisdiction pursuant to s. 910.005(2), F.S., if either the person's conduct that is an element of the offense occurs in Florida, or if the result of the conduct that is an element of the offense occurs in Florida. Section 910.005(3), F.S., provides that a person is subject to Florida criminal jurisdiction if his or her offense is based on an omission to perform a duty imposed by Florida law, regardless of the location of the offender at the time of the omission.

The state's ability to fully enforce criminal jurisdiction in these circumstances has not been definitively resolved by the courts. In a criminal prosecution pursuant to the bill, the state would have to establish beyond a reasonable doubt that the essential elements of the offense were committed in Florida.[4]

C. EFFECT OF PROPOSED CHANGES:

Section 1: Revises the definition of "sexual conduct" in s. 827.071(1)(g), F. S.

Section 1 amends s. 827.071(1)(g), F.S., to revise the definition of "sexual conduct" to conform with the definition of "sexual conduct" in s. 847.001(11).

Section 2: Adds and revises several definitions in s. 847.001, F.S.

Section 2 amends s. 847.001, F.S., to add definitions for "child pornography" and "transmit" or "transmission." The present definitions of "harmful to minors," "person," and "sexual conduct" are revised.

Section 3: Gives legal effect to the intent of s. 847.0135(2), F.S.

Subsection 847.0135(2), F.S., defines "computer pornography" but does not currently prohibit the enumerated acts. The bill amends subsection 847.0135(2), F.S., to provide that a person who commits an act specified in the subsection commits a felony of the third degree. This section of the bill corrects an apparent drafting error, gives effect to the legislative intent of the subsection, and clarifies that notices, statements, or advertisements that contain information regarding a minor's personal identification information used for the purposes of eliciting sexual conduct of or with a minor amount to criminal activity.

Section 4: Criminalizes internet transmission of child pornography and images harmful to minors

Section 4 of the bill creates s. 847.0137, F.S., which criminalizes two kinds of transmissions:

1. Child pornography transmitted to any person; and
2. Any image, information or data "harmful to minors"[5] when transmitted to any minor in Florida.

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[4] *See, e.g.,* Ross v. State, 665 So.2d 1004 (Fla. 4th DCA 1996), *rehearing and rehearing en banc denie*d, *review granted* 682 So.2d 1100, *review dismissed* 696 So.2d 701.

[5] "Harmful to minors," as used in Section 4, is defined in s. 847.001, F.S., as material that depicts nudity, sexual conduct, or sexual excitement that: (a) predominantly appeals to the prurient, shameful or morbid interest of minors, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitabl without serious literary, artistic, political, or scientific value for minors. The three-prong analysis for determining whether material is e material to minors, and (c) taken as a whole, is "harmful to minors" was announced by the U.S. Supreme Court in *Miller v. California*, 413 U.S. 15 (1973) and remains unchanged in recent Supreme Court opinions.

The prohibition extends to persons located either inside or outside Florida at the time of such transmission.

Transmitter located in Florida

Under Section 4, any person in Florida who knows or reasonably should know he or she is transmitting child pornography irrespective of its destination to any person commits a third degree felony. Section 4 also provides that any person in Florida who knowingly transmits any image, information or data harmful to minors to a minor in Florida commits a third degree felony.

Transmitter located outside the state

Section 4 makes the knowing transmission of child pornography to any person in Florida by a person in another jurisdiction a third degree felony offense. Section 4 also makes the knowing transmission of any image, information or data harmful to minors by a person in another jurisdiction to a minor in Florida a third degree felony offense.

Venue

Section 4 provides for criminal prosecution in Florida or in other jurisdictions for a violation of the Florida law, even where the penalties in other jurisdictions are greater than provided by s. 847.0137, F.S. The bill provides that any person is subject to prosecution in Florida, pursuant to ch. 910, F.S., for any act or conduct proscribed by s. 847.0137.

Exceptions

Section 4 would provide that the provisions of s. 847.0137 do not apply to subscription-based transmissions such as list servers.

Section 5: Establishes immunity from civil liability for persons reporting child pornography to law enforcement

Section 5 creates s. 847.0139, F.S., which provides that a person who reports to a law enforcement officer what he or she reasonably believes is evidence of child pornography, transmission of child pornography, or transmission of any image, information or data harmful to minors to a minor in Florida may not be held civilly liable for reporting the information. Furnishing the law enforcement officer with a copy of a photograph or other evidence of what the person reasonably believes is child pornography would be included in the immunity.

Section 6: Severability

Section 6 provides for severance of any part of the bill that may be ruled unconstitutional so that the remainder of the bill would remain in effect.

Section 7: Effective Date

Section 7 provides an effective date of July 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill would generate no new revenues, except through the collection of any fine imposed as a criminal penalty for conviction of any prohibited act.

2. Expenditures:

The bill is anticipated to have a minimal or insignificant fiscal impact on state government. The bill would require the State to fund its proportionate share of the additional cost of investigating, prosecuting, incarcerating and supervising persons convicted of any prohibited act and from defending the law from any constitutional challenges.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill would generate no new revenues, except through the collection of any fine imposed as a criminal penalty for conviction of any prohibited act.

2. Expenditures:

The bill would require local governments to fund their proportionate share of the additional costs of investigating, prosecuting, incarcerating and supervising persons convicted of a prohibited act and the costs of defending the law from constitutional challenges.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that individuals transmitting child pornography or images "harmful to minors" earn revenues from such transmissions, successful prosecutions under the bill could reduce such revenues. The bill specifically exempts subscription-based transmissions, such as list servers, from its transmission prohibitions.

D. FISCAL COMMENTS:

The bill is not expected to have a significant fiscal impact. The Criminal Justice Impact Conference analyzed a similar bill last year (CS/SB 1284) and determined it would have no impact upon state prison population because the bill would create an unranked third degree felony offense. An unranked third degree felony is treated as a Level One offense under Chapter 921. As such, the lowest permissible sentence includes a nonstate prison sanction. The Criminal Justice Impact Conference will analyze CS/HB 203 at its next meeting.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is a criminal law and is exempt from the mandates provision of Article VII, Section 18 of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Conforming the definition of "sexual conduct" in s. 847.001(11), F.S., to recent Florida Supreme Court decisions

The bill amends the definition of "sexual conduct" in section 847.001, F.S. The purpose of the amendment is to clarify the criminal intent element of the prohibited activity. If challenged, the present definition of "sexual conduct" in s. 847.001, F. S. would be in danger of being held unconstitutionally vague.[6] The origin of the apparent deficiency of the present definition of "sexual conduct" in s. 847.001, F.S., is statutorily connected to the the definition of "sexual conduct" in s. 827.071, F.S. In 1986, the Florida Legislature amended Ch. 827, F.S., and Ch. 847, F.S., to make consistent the definitions of "sexual conduct" provided in s. 827.071, F.S., and in s. 847.001, F.S.[7]

Subsequently, the s. 827.071, F.S., definition was subject to judicial scrutiny when challenged in the case of *Schmitt v. State*, 590 So.2d 404 (Fla. 1991). In holding part of the definition unconstitutionally overbroad and vague, the Florida Supreme Court found void the portion of the definition of "sexual conduct" in s. 827.071(g), F.S., that consists of "actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast[.]" The Court severed that part from the remainder of the definition and found Ch. 827, F.S., was otherwise constitutional.

In 1991, in response to the *Schmitt* case, the Legislature amended s. 827.071, F.S., to insert the words "actual physical contact with a person's clothed or unclothed genital, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party" to cure the constitutional deficiency in the definition there provided for "sexual conduct." However, the legislation did not address or amend the definition of "sexual conduct" in s. 847.001, F.S.[8]

In 1993, the Legislature amended the definition of "sexual conduct" provided in s. 847.001, F.S., to provide in the definition the sentence that, "[a] mother's breastfeeding of her baby does not under any circumstance constitute 'sexual conduct.'" [9] This legislation failed to address or amend the definition of "sexual conduct" in s. 827.071, F.S.

Federal Constitutional Challenges under the First Amendment and Commerce Clause

The First Amendment

[6] *See, e.g., Schmitt v. State*, 590 So.2d 404 (Fla. 1991).
[7] *See* Ch. 86-238, Laws of Florida.
[8] *See* Ch. 91-33, Laws of Florida.
[9] *See* Ch 93-4, Laws of Florida.

Courts have recognized the "conflict between one of society's most cherished rights – freedom of expression – and one of the government's most profound obligations – the protection of minors." [10] The bill could be cited by proponents as an effort to protect minors, while opponents could argue that the bill is an unconstitutional infringement upon the freedom of speech. One of the activities regulated by the bill is the transmission of material that is "harmful to minors." Whether or not an image is "harmful to minors" is based on the statutory definition and reflects a legislative choice to shield certain persons from certain material. The bill may be a content-based regulation of speech inasmuch as it regulates the transmission of images "harmful to minors." All content-based speech regulations promulgated by government are presumptively invalid and are subject to strict scrutiny to ensure they do not violate the First Amendment.[11] Strict scrutiny is used to evaluate the constitutionality of regulatory action that criminalizes certain speech because the stigma of a criminal conviction could cause both prohibited and permissible speech to be chilled.[12] To survive such scrutiny, the government must demonstrate that it has a compelling interest in restricting the speech.[13] Additionally, the restriction must be narrowly tailored via the least restrictive means possible to ensure that constitutionally protected speech is not also prohibited or chilled in its expression.[14]

Proponents of the bill could argue that the bill can survive strict scrutiny. It is well-settled law that government has a compelling interest in preventing child pornography and in protecting the physical and psychological well being of minors.[15] Legislation intended to restrict the dissemination of child pornography, however must be carefully drawn to ensure that it does not prohibit or restrict protected speech. Although some laws enacted to restrict child pornography have been upheld,[16] broad regulation of images "harmful to minors" has received greater scrutiny and many such laws have been struck down.[17] Proponents of the bill could argue that the bill can be distinguished from unconstitutionally broad regulations in that the bill only criminalizes the transmission of images harmful to minors when a person knows or reasonably should know that a minor in Florida is receiving the transmission.

Cases Interpreting State Legislation

The bill's constraints on transmissions of child pornography and images 'harmful to minors' may be subject to constitutional challenges under the First Amendment because such restraints may be over-inclusive. At least four other states have passed statutes attempting to regulate Internet transmission of materials harmful to minors.[18] All of these statutes have been struck down.[19]

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[10] *See, e.g., American Booksellers v. Webb*, 919 F.2d 1493, 1495 (11th Cir. 1990).

[11] *See PSINet Inc. v. Chapman*, 108 F. Supp. 2d 611, 624 (W.D. Va. 2000) (citing *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989)).

[12] *See ACLU v. Reno*, 521 U.S. 844, 872 (1997) (holding that strict scrutiny applies to content-based regulation of Internet speech).

[13] *See id.*

[14] *See ACLU v. Johnson*, 194 F.3d 1149, 1156 (10th Cir. 1999).

[15] *See Osborne v. Ohio*, 495 U.S. 103, 109 (1990); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982). The Supreme Court in *Ferber* noted that the prevention of exploitation and abuse of children is a substantial government interest. States are entitled to greater leeway in regulating child pornography. The Supreme Court also noted that child pornography is harmful to the emotional well-being of children and that state efforts to eradicate the market for child pornography, if properly drafted, were legitimate. Additionally, in *Osborne*, the Supreme Court noted that visual records of child pornography subjected children to ongoing injury.

[16] *See* N.Y. PENAL LAW § 263.15 (1982) (prohibiting promotion of performances involving child pornography by distributing material advertising the performance) (upheld in *Ferber*, 458 U.S. 747); OHIO REV. CODE ANN. § 2907.323(A)(3) (Supp. 1989) (prohibiting possession of child pornographic materials) (upheld in *Osborne*, 495 U.S. 103).

[17] *See, e.g., ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000).

[18] N.Y. PENAL LAW § 253.21(3) (1996); VA. CODE ANN. § 18.2-390, 18.2-391 (Michie Supp. 1999); N.M. STAT. ANN. § 30-37-22(c) (1998); MICH. COMP. LAWS ANN. § 722.675(1) (West 1999) (as amended by 1999 Mich. Pub. Acts 33).

Unlike the bill, several of these statutes contained affirmative defenses against conviction for improper transmission of materials harmful to minors such as where the sender makes a good-faith reasonable effort to ascertain the age of the minor and the sender is misled by the actions of the minor.[20] Additionally, parents are permitted the right to make individual decisions about whether their children view images which might be deemed harmful to minors.[21] The parental choice issue may be especially relevant in the context of the Internet, as compared to broadcast media, because viewing Internet images is largely by choice and can be blocked on a household-by-household basis.[22] Opponents could argue the bill interferes with family privacy and parental choice because the bill restricts the transmission of content deemed harmful to minors rather than allowing individual parents to make decisions about the content their children view. Opponents may use this example to support an argument that the bill fails strict scrutiny because it is not the least restrictive means of limiting the exposure of minors to such speech.

In sustaining constitutional challenges to these statutes, federal courts have noted the inherent difficulty of verifying the age of the person to whom a communication is sent over the Internet.[23] Federal courts have also emphasized that less restrictive means of limiting the exposure of children to harmful images, such as the utilization of filtering software by parents, are available to serve the state's interests.[24]

Cases Interpreting Federal Legislation

Legislation enacted by Congress to regulate the transmission of material harmful to minors has been successfully challenged on First Amendment grounds. In *ACLU v. Reno*, the U.S. Supreme Court invalidated the Communications Decency Act (CDA), which was enacted to regulate transmission of indecent materials to minors.[25] The CDA, codified at 47 U.S.C. § 223(a), prohibited the knowing transmission of obscene or indecent material to any recipient who is under 18 years of age. The Court invalidated the CDA, concluding that the law was overly broad as it also impinged on communications between adults. Noting that current technology provides no method for identifying the age of an Internet mail recipient, the Court reasoned that an adult, who intent upon sending an email to the members of a 100-person chat room, could likely be imputed with knowledge that at least one of the intended recipients is a minor. The result would be that, under the CDA, an adult would be prohibited from sending any such message to such an audience; thus, the CDA would have the operative effect of restricting constitutionally permitted speech along with the intended prohibited speech. In striking down the CDA, the Court reasoned that the statute was not drafted with the precision that the First Amendment requires when a statute regulates the content of speech.[26]

In response to the Supreme Court's ruling, Congress passed the Child Online Protection Act (COPA) to specifically address the Court's concerns with the CDA.[27] The U.S. Court of Appeals for the Third Circuit, however, has held this law unconstitutional, as violative of the First Amendment. [28]

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[19] *See American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York); *PSINet*, 108 F. Supp. 2d 611 (W.D. Va. 2000) (Virginia); *ACLU v. Johnson*, 194 F.3d 1149 (New Mexico); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (Michigan). *But see Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding prohibition on print media sale of images harmful to minors to persons under 17).

[20] *See, e.g., N.Y. Penal Law* § 235.23(3)(a).

[21] *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

[22] *Compare United States v. Playboy Entertainment Group*, 120 S. Ct. 1878, 1887 (2000) *with ACLU v. Reno*, 521 U.S. at 854.

[23] *See, e.g., American Libraries*, 969 F. Supp. at 167; *ACLU v. Reno*, 521 U.S. at 856.

[24] *See, e.g., PSINet*, 108 F. Supp. 2d at 625; *Cyberspace Communications*, 55 F. Supp. 2d at 750-51.

[25] *ACLU v. Reno*, 521 U.S. at 876.

[26] *Id.*

[27] *See* Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231).

Because the bill would prohibit images "depicting or intending to depict" child pornography, it could be challenged as overbroad. Opponents may argue that the bill does not distinctly limit its prohibition to images of actual children. Images "intending to depict child pornography" could, for example, include images of consenting adults with a youthful appearance engaging in pornographic acts. Even though such images do not involve a minor, they may nonetheless fall within the definition of "child pornography" provided in the bill. Opponents could also argue that the rationales for prohibiting child pornography, such as preventing the emotional or physical abuse of the child in the image, are lessened when the subject is actually an adult.

"Virtual pornography" may also fall within the definition of "child pornography" provided in the bill where a computer-generated image intends to depict a minor engaged in "sexual conduct." The recent advent of digital imaging technology has heightened the ability of pornographers to fabricate life-like images that appear to contain minors engaged in sexual conduct. Congress attempted to address this area by passing the Child Pornography Protection Act of 1996 (CPPA).[29] The CPPA defined "child pornography" to include "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means" of sexual conduct involving a minor. In striking down the CPPA as unconstitutional when applied to virtual pornography, the U.S. Court of Appeals for the Ninth Circuit noted that the justifications for restricting actual child pornography are not as strong for virtual child pornography.[30] The *Free Speech Coalition* court also noted that Congress had no compelling interest in restricting virtual pornography that did not involve actual children.[31] This case is currently on appeal, and the Supreme Court has agreed to review the case. The CPPA has been held constitutional when applied to images of actual children.[32]

The Commerce Clause

Opponents of the bill may argue that it is violative of the Commerce Clause of the United States Constitution. Article I, Section 8 of the U.S. Constitution grants Congress the power to regulate interstate commerce. The U.S. Supreme Court has held that the power of Congress in this area is exclusive.[33] Although the Commerce Clause is an affirmative grant of power to Congress, the exclusive nature of the power prohibits states from interfering with interstate commerce. This negative power of the Commerce Clause is known as the "dormant" Commerce Clause.

The "dormant" Commerce Clause restricts the abilities of individual states to interfere with interstate commerce in two ways. First, states cannot discriminate directly against interstate commerce by passing protective legislation that restricts out-of-state commerce from entering the state's market.[34] Second, states may not create regulations that, although facially neutral, unduly burden interstate commerce.[35] The need for Congress, rather than the individual states, to regulate an area of interstate commerce has been particularly noted where the field contains unique characteristics that demand cohesive national treatment.[36]

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[28] *See ACLU v. Reno*, 217 F.3d 162 (3rd Cir. 2000) ("Reno II").
[29] *See* 18 U.S.C.A. § 2256(8)(B) (West Supp. 1999).
[30] *See Reno v. Free Speech Coalition*, 198 F.3d 1083, 1093 (9th Cir. 1999).
[31] *Id.* at 1092.
[32] *See United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999).
[33] *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).
[34] *See Philadelphia v. New Jersey*, 437 U.S. 617 (1978).
[35] *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).
[36] *See American Libraries*, 969 F. Supp. at 169.

Several federal courts have held that state statutes attempting to regulate the content of Internet communications violate the Commerce Clause. In *American Libraries,*[37] *Johnson*[38] and *PSINet,*[39] the federal courts invalidated state statutes attempting to regulate the transmission of child pornography and images harmful to minors on the grounds that the statutes violated the Commerce Clause.[40] The courts all noted that if Internet content was to be regulated, such regulation would have to be based on consistent, national standards articulated by Congress.[41] In *Johnson*, the State of New Mexico tried to justify its statute by claiming that the state was merely trying to regulate the transmission of email communications between New Mexico citizens. However, the *Johnson* court dismissed this argument because a significant portion of emails between New Mexico citizens passed through out-of-state servers before reaching their destination. A similar argument also failed in *American Libraries*. Thus, the inherent interstate nature of the Internet prompted these courts to reject state attempts to regulate Internet content.

The federal courts in these cases have also noted the difficulty of identifying the geographic location of email recipients.[42] Because most email addresses do not contain information identifying the geographic location of the recipient, a sender may not know whether the recipient is in Florida. A person in another jurisdiction could, thus, unwittingly send prohibited material to a person in Florida. Under the bill, even though a sender must knowingly transmit the prohibited images, a sender in another state arguably might self-censor themselves to prevent running afoul of the prohibitions of the bill. Opponents of the bill could argue that such self-censorship would chill the exercise of constitutionally protected rights of individuals. The chilling effect of similar laws in the aforementioned cases led the courts to hold them unconstitutional on both Commerce Clause and First Amendment grounds.

The bill regulates Internet "transmissions" of child pornography and transmissions of any image, information or data harmful to minors." Because "transmissions," as defined in the bill, includes "electronic mail communications," or emails, the changes in the law proposed by the bill would likely receive the same kind of Commerce Clause scrutiny as the statutes mentioned in the cases above. Regulating email transmissions received by Florida residents could impact interstate commerce because many emails traveling into Florida come from or go through other jurisdictions. Further, even emails between Florida residents could pass through servers in other states, making them a part of interstate commerce. Thus, even if Florida's compelling interest in eradicating child pornography could survive First Amendment scrutiny, an argument could be made that the Bill is unconstitutional because of its impact on interstate commerce. Additionally, recent congressional attempts to regulate this subject matter, the CDA, CPPA and COPA, demonstrate that Congress is aware of the problem and is attempting to address it via nationwide regulations.

Ultimately, proponents of the bill could argue that the transmissions regulated under the bill are criminal activity and thus, are no different from other criminal activity that may take place in an arena subject to regulation under the commerce clause. For example, highway traffic regulations have been held to require "a cohesive national scheme of regulations so that users are reasonably

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[37] *See American Libraries*, 969 F. Supp. at 183-84 (New York).
[38] *See Johnson*, 194 F.3d at 1161 (New Mexico).
[39] *See PSINet*, 108 F. Supp. 2d at 626-27 (Virginia).
[40] *See supra*, n. 6.
[41] *See American Libraries*, 969 F. Supp. at 181; *Johnson*, 194 F.3d at 1162; *PSINet*, 108 F. Supp. 2d at 627.
[42] *See American Libraries*, 969 F. Supp. at 165, 167 ("Regardless of the aspect of the Internet they are using, Internet users have no way to determine the characteristics of their audience that are salient under the New York Act – age and geographic location."); *Johnson*, 194 F.3d at 1161; *PSINet*, 108 F. Supp. 2d at 616 ("The Internet also is wholly insensitive to geographic distinctions, and Internet protocols were designed to ignore rather than to document geographic location...Most Internet addresses contain no geographic information at all…Participants in online chat rooms have no way to tell when participants from another state join the conversation.")

able to determine their obligations."[43] However, our nations highways are far from free of state regulation. In matters of criminal law, concurrent state regulation is common. For example, individual states may set breath-alcohol content levels for purposes of state Driving Under the Influence statutes. The legally permissible breath-alcohol content level varies from state to state, yet is not an undue burden on interstate travelers. Although interstate highway travel may amount to commerce, it is a matter of state criminal law when that travel occurs while the driver's breath-alcohol content level reaches a level prohibited under state criminal law. Similarly, proponents of the bill may argue that traveling the "information superhighway" is an arena subject to regulation under the federal commerce clause, but traveling the "information superhighway" while committing criminal activity as defined in a particular state is an activity subject to state regulation.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Information Technology reported the bill out favorably as a committee substitute, which incorporated several technical and conforming amendments.

VII. SIGNATURES:

COMMITTEE ON INFORMATION TECHNOLOGY:

Prepared by:	Staff Director:
John Barley/Richard Martin	Charles Davidson

AS REVISED BY THE COMMITTEE ON CHILD & FAMILY SECURITY:

Prepared by:	Staff Director:
María E. Vives Rodríguez	Bob Barrios

AS FURTHER REVISED BY THE COMMITTEE ON JUVENILE JUSTICE:

Prepared by:	Staff Director:
Lori Ager	Lori Ager

[43] *See Pataki*, 969 F.Supp at 182.

AS REVISED BY THE COUNCIL FOR READY INFRASTRUCTURE:

Prepared by:	Staff Director:
Randy L. Havlicak	Thomas J. Randle